UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-SAJ **THE CARGILL DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWERS TO ADD COUNTERCLAIMS AND INTEGRATED BRIEF IN SUPPORT**

Pursuant to Federal Rules of Civil Procedure 13 and 15, Cargill, Inc. ("Cargill") and Cargill Turkey Production, LLC ("CTP") (together, the "Cargill Defendants") hereby move for leave to amend their respective Answers to Plaintiffs' Second Amended Complaint to assert against Plaintiffs counterclaims for contribution under CERCLA and Oklahoma law, and provide this integrated brief in support. Copies of the proposed counterclaims are attached as Exhibits 1 (for Cargill) and 2 (for CTP).

In accordance with N.D. Okla. LCvR7.1(l), the Cargill Defendants note that the Court's Scheduling Order of March 9, 2007 set a deadline of March 1, 2007 for the joinder of additional parties, but includes no deadline for other amendments to the pleadings.[1] (Dkt. No. 1075 at 2.) The Cargill Defendants understand that no other Defendant objects to this motion but that Plaintiffs do object.

I. INTRODUCTION

On June 11, 2007, the United States Supreme Court issued a landmark CERCLA decision in United States v. Atlantic Research Corp., __ U.S. __, 127 S. Ct. 2331 (2007). The decision

[1] The current Scheduling Order of November 15, 2007 omits all deadlines passed. (Dkt. No. 1376 at 2, n.1.)

resolved a circuit court split and changed the law in the Tenth Circuit regarding the ability of a potentially responsible party ("PRP") to assert a cost recovery claim under CERCLA § 107(a), 42 U.S.C. § 9607(a). The Cargill Defendants, like other Defendants, have argued from the outset of this action that if Defendants are found to be PRPs under the facts of this case, Plaintiffs themselves likewise qualify as PRPs under CERCLA and are liable for statutory and common law contribution. For example, CTP's and Cargill's Answers to Plaintiffs' First Amended Complaint filed in October 2005 asserted the affirmative defenses that Plaintiffs were contributorily at fault for Plaintiffs' alleged damages (Dkt. Nos. 51 and 52: Aff. Def. ¶¶ 14, 36), and that Plaintiffs' CERCLA claims were barred by their status as PRPs (Dkt. Nos. 51 and 52: Aff. Def. ¶ 48). The Cargill Defendants renewed these defenses in their Answers filed in July 2007 to the Second Amended Complaint. (Dkt. Nos. 1240 and 1241: Aff. Def. ¶¶ 14, 36, 48.)

Under Tenth Circuit precedent prior to the Atlantic Research decision, once the Cargill Defendants established Plaintiffs' PRP status, Plaintiffs' § 107(a) cost recovery claim would have been defeated and Plaintiffs could only have recovered under a § 113(f) several-liability contribution claim. See Young v. United States, 394 F.3d 858, 862-63 (10th Cir. 2005); Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc., 100 F.3d 792, 800 (10th Cir. 1996); United States v. Colo. & E. R.R., 50 F. 2d 1530, 1534-36 (10th Cir. 1995); Sun Co. v. Browning-Ferris, Inc., 919 F. Supp. 1523, 1528 (N.D. Okla. 1996); Raytheon Aircraft Co. v. United States, 435 F. Supp. 2d 1136, 1145 (D. Kan. 2006). The Atlantic Research decision altered this structure by recognizing that a PRP may assert a claim for cost recovery under certain circumstances. See generally 127 S. Ct 2331. In discussing the newly clarified distinction between CERCLA §§ 107(a) and 113(f), the Supreme Court noted that "a defendant PRP in such a § 107(a) suit [brought by a plaintiff PRP] could blunt any inequitable distribution

of costs by filing a § 113(f) counterclaim." Id. at 2339 (citations omitted). In such a situation, "[r]esolution of a § 113(f) counter-claim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action." Id.

Thus, under Atlantic Research, the Cargill Defendants must now assert their affirmative defenses as counterclaims for contribution under CERCLA § 113(f), and by extension under Oklahoma law, to prevent a potentially inequitable apportionment of the alleged response costs and damages. Through their § 113(f) and Oklahoma law counterclaims, the Cargill Defendants intend to seek contribution for any costs incurred in responding to any injunction this Court may enter under RCRA in addition to contribution for traditional CERCLA response costs.

II. ARGUMENT

In the interests of both justice and judicial efficiency, the Cargill Defendants urge this Court to grant the Cargill Defendants leave to amend their Answers to assert the proposed CERCLA and Oklahoma law counterclaims. Should the Cargill Defendants be found liable under CERCLA without the ability to seek fair contribution or symmetrical injunctive relief from Plaintiffs for their own role as PRPs, the Cargill Defendants and all Defendants would be left to unjustly bear the cost of problems created and maintained by Plaintiffs themselves, or at the very least to start a separate action to recover any costs for which Plaintiffs are responsible.

A. This Court Should Liberally Grant Leave to Add Counterclaims.

Courts are liberal in permitting the amendment of pleadings adding counterclaims. Federal Rule of Civil Procedure 13(e) allows for additional counterclaims that "matured or w[ere] acquired by the pleader after serving a pleading." Rule 13(f) also provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." In the

Tenth Circuit, the clause "when justice requires" is an independent ground on which the Court may grant leave to assert a counterclaim by amendment. See Smith Contracting Corp. v. Trojan Const. Co., 192 F.2d 234, 236 (10th Cir. 1951) (finding district court erred in refusing to allow amendment of answer to add counterclaim because such allowance is freely given where justice so requires). The decision to grant a motion to amend an answer to assert a counterclaim is within the sound discretion of the Court. Sil-Flo, Inc. v. DFNC, Inc. 917 F.2d 1507, 1518 (10th Cir. 1990); Aviation Materials, Inc. v. Pinney, 65 F.R.D. 357, 358 (N.D. Okla. 1975).

In employing Rule 13(f)'s "when justice so requires" element, courts look to Rule 15(a)'s general mandate that leave to amend pleadings "shall be freely given when justice so requires." Smith Contracting, 192 F.2d at 236 (quoting Fed. R. Civ. P. 13(f) and 15(a)). Federal courts across the country have adopted this standard, reading Rules 13(f) and 15(a) together to liberally allow amended pleadings asserting new counterclaims to be filed when justice requires. E.g., Banco Para El Comercio Exterior De Cuba v. First Nat'l City Bank, 744 F.2d 237, 243 (2d Cir. 1981); T. J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338, 370 n.68 (5th Cir. 1980); Bank of New York v. Sasson, 786 F. Supp. 349, 352 (S.D.N.Y. 1992); Laborers' Pension Fund v. Litgen Concrete Cutting & Coring Co., 128 F.R.D. 96, 99 (N.D. Ill. 1989); accord 3-13 Moore's Federal Practice—Civil § 13.43 (2007).

A refusal to allow amendment when justice requires is an abuse of discretion. Smith Contracting, 192 F.2d at 236. Put another way, absent a good reason for denial "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment," this Court should apply the familiar standard of Rule 15(a) and grant the Cargill Defendants leave to add the proposed counterclaims.

See Foman v. Davis, 371 U.S. 178, 182 (1962); see also, e.g., Banco Para El Comercio, 744 F.2d at 243; Bank of New York, 786 F. Supp. at 352; Laborers' Pension Fund, 128 F.R.D. at 99; SFM Corp. v. Sundstrand Corp., 99 F.R.D. 101, 105 (N.D. Ill. 1983) (each applying the Foman standard to Rule 13 motion to add counterclaim).

In particular, unless the amendment would cause prejudice to the opposing party, a court should generally grant leave to amend. "Absent flagrant abuse, bad faith, futility of amendment, or truly inordinate and unexplained delay, prejudice to the opposing party is the key factor in deciding a motion to amend." Waddell & Reed Fin., Inc. v. Torchmark Corp., 223 F.R.D. 566, 630 (D. Kan. 2004) (citation omitted). In this context, "prejudice … means undue difficulty in defending a lawsuit because of a change of tactics or theories on the part of the other party." Id. (citations omitted); see also Fields v. Atchison, Topeka & Santa Fe Ry., 167 F.R.D. 462, 463 (D. Kan. 1996) (relevant considerations for adding a counterclaim may include the type of counterclaim, prejudice to the opposing party, and delay of the trial for further discovery).

B. Applying the Liberal Standard, the Court Should Grant the Cargill Defendants Leave to Assert Their Counterclaims.

All the relevant factors here weigh strongly in favor of allowing the Cargill Defendants' requested amendments.

1. No Undue Delay, Bad Faith, or Dilatory Motive Exists.

The Supreme Court's Atlantic Research decision is new law, and the Cargill Defendants acted promptly in seeking the CERCLA and related Oklahoma contribution amendments. There is no undue delay, bad faith, or dilatory motive in seeking these amendments. See Foman, 371 U.S. at 182.

2. The Proposed Counterclaims Raise No New Issues.

The addition of the Counterclaims would introduce no new issues into the case and would require no additional discovery by any party. The factual and legal claims underlying all the counterclaims have been a part of this case from the start. The Cargill Defendants (and other Defendants) have always insisted that Plaintiffs were contributorily liable under the common law for any damages caused by their own acts or status under CERCLA. (See, e.g., Dkt. Nos. 51 and 52: Aff. Def. ¶¶ 14, 36; Dkt. Nos. 1240 and 1241: Aff. Def. ¶¶ 14, 36.) The Cargill Defendants (and other Defendants) have always maintained that Plaintiffs have committed their own acts and omissions rendering them liable under CERCLA for any claimed cleanup costs or natural resource damages to the IRW. (See, e.g., Dkt. Nos. 51 and 52: Aff. Def. ¶ 48; Dkt. Nos. 1240 and 1241: Aff. Def. ¶ 48.)

The proposed counterclaims represent no "change of tactics or theories on the part of" the Cargill Defendants, see Waddell & Reed Fin., 223 F.R.D. at 630, but merely a reorientation of procedural posture to reflect a change in Supreme Court law. As a result, Plaintiffs would suffer *no* prejudice, much less unfair prejudice, from the amendments. See Foman, 371 U.S. at 182; see also Waddell & Reed Fin., 223 F.R.D. at 630; Fields, 167 F.R.D. at 463.

3. The Court May Grant Relief Under the Proposed Counterclaims.

Given the liberal standard, Plaintiffs can make no reasonable argument that the Court should deny leave to amend based on any alleged futility of the proposed CERCLA and related Oklahoma law counterclaims. Compare Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992) (applying Foman to find a proposed amendment futile where it "could not have withstood a motion to dismiss or otherwise failed to state a claim"). Here, the proposed amendments state counterclaims upon which relief may be granted to the Cargill Defendants.

First, the proposed CERCLA amendments state a § 113(f) counterclaim for contribution—precisely the claim that the Atlantic Research Court anticipated in precisely the form that the Atlantic Research Court recommended. See 127 S. Ct. at 2339 ("[A] defendant PRP may trigger equitable apportionment by filing a § 113(f) counterclaim.")

The proposed counterclaims include contribution for any costs incurred in complying with a RCRA injunction in addition to usual CERCLA response costs. Although the interplay between RCRA and CERCLA § 113(f) remains an emerging area of law, courts around the country have found that "[c]osts arising from RCRA compliance can be recovered in a CERCLA action." Union Carbide Corp. v. Thiokol Corp., 890 F. Supp. 1035, 1044 (S.D. Ga. 1994); see also, e.g., United States v. E.I. du Pont de Nemours & Co., 341 F. Supp. 2d 215, 236-38 (W.D.N.Y. 2004); United States v. Rohm & Haas Co., 790 F. Supp. 1255, 1262 (E.D. Pa. 1992); Mardan Corp. v. C.G.C. Music. Ltd., 600 F. Supp. 1049, 1054 (D. Ariz. 1984) ("…RCRA compliance costs may also be considered 'response costs' under CERCLA."). The legislative schemes in RCRA and CERCLA were designed to remedy environmental harms in distinct and complementary manners. Whereas RCRA's primary purpose is to reduce the generation of hazardous waste and ensure proper treatment, storage, and disposal of waste nonetheless generated so as to minimize present and future threats to human health and the environment, CERCLA is principally designed to effect the cleanup of toxic waste and to compensate those who remediate environmental hazards. Meghrig v. KFC W., 516 U.S. 479, 483 (1996). Although Congress did not intend for persons to recover their response costs through the vehicle of RCRA, see id. at 484-85, Congress certainly did not intend for persons to be barred from seeking such costs. Rather, per Atlantic Research, parties must follow the strictures of CERCLA

§ 113(f) to recover contribution for costs incurred that are substantially consistent with the National Contingency Plan ("NCP").

Nor could the Court conclude as a matter of law that Defendants' potential RCRA compliance costs here would be inconsistent with the NCP and thus unrecoverable under a CERCLA counterclaim. The Western District of New York recently addressed an EPA CERCLA § 107 response cost claim seeking to recover, inter alia, the cost of overseeing a defendant's performance of a RCRA Order and Consent Decree. E.I. du Pont de Nemours & Co., 341 F. Supp. 2d at 233. The court rejected the defendant's argument that, because the RCRA remedy was not specifically authorized or available under CERCLA, the remedy was necessarily inconsistent with the NCP. Id. at 236 (noting that no case law existed supporting such proposition). Likewise, the court found that the EPA's use of RCRA response authority was not per se inconsistent with the NCP, emphasizing the breadth of CERCLA's cost recovery provisions. Id. at 237. Based on the specific facts of the case, the court found the RCRA costs were consistent with the NCP and recoverable via CERCLA. Id. at 237-38.

Here, the Cargill Defendants seek leave to file a CERCLA § 113(f) counterclaim encompassing all recoverable response costs incurred. If prevented from counterclaiming for contribution for costs incurred in the course of complying with a RCRA injunction and limited to traditional costs incurred under CERCLA, the Cargill Defendants would be left with only a partial contribution remedy. Compare S.C. Dep't Health & Envtl. Control v. Commerce & Indus. Ins. Co., 372 F.3d 245, 254-58 (4th Cir. 2004) (declining to recognize a right to use RCRA's direct insurance action provision to pursue CERCLA cost recovery claims directly against insurers, as CERCLA contains its own direct insurance action provision). In the interest

of justice, this Court should allow the Cargill Defendants to plead their CERCLA counterclaim as proposed, covering potential recoverable CERCLA and RCRA costs.

The Oklahoma contribution counterclaims relatedly follow. To parallel the Supreme Court's direction that CERCLA contribution claims may be raised via § 113(f) counterclaims, the Cargill Defendants' claims for contribution under Oklahoma law should likewise be addressed in the instant action as counterclaims rather than as affirmative defenses as currently pled. The Oklahoma contribution statute provides for a limited right of contribution among jointly or severally liable tortfeasors.[2] 12 Okla. Stat. § 832. In Atlantic Research, the Supreme Court found that "contribution" under § 113(f) is defined as the common law tortfeasor's "right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." Atlantic Research, 127 S. Ct. at 2337-38 (citation omitted). Hence, to whatever extent the Cargill Defendants are unable to collect the full equitable share of costs from Plaintiffs through CERCLA, the Cargill Defendants are entitled to invoke 12 Okla. Stat. § 832 to recover outstanding contribution amounts, if any.

The Cargill Defendants' counterclaims would not be futile, and the Court should grant the instant motion.

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[2] Section 832 is taken verbatim from the Uniform Contribution Among Tortfeasors Act ("UCATA"). Atl. Richfield Co. v. Am. Airlines, Inc., 1993 U.S. Dist. LEXIS 20278, at *45 (N.D. Okla. Aug. 3, 1993). A federal district court recently found that under the holding of Atlantic Research, parties may file counterclaims for UCATA contribution for equitable apportionment of cost recovery liability in addition to asserting § 113(f) counterclaims for contribution. United States v. Sunoco, Inc., 501 F. Supp. 2d 656, 664 (E.D. Pa. 2007) (citing Atlantic Research, 127 S. Ct. at 2339).

4. Granting the Motion Serves Judicial Efficiency.

Finally, permitting the amendments would serve the interest of judicial efficiency. Should the Court decline to permit the Cargill Defendants to pursue CERCLA and Oklahoma contribution claims in the present action, they would have little choice but to pursue their contribution claims and the allocation of response costs against Plaintiffs in a separate action.

Such an artificial division of closely related issues would make no sense. Unlike the third-party contribution claims the Court has already severed (see Dkt. Nos. 914-16 and 940), the proposed counterclaims focus on Plaintiffs' own conduct as PRPs. This conduct by Plaintiffs will necessarily be a focus of the trial evidence in the present case regardless of whether the counterclaims are directly at issue, as all of the underlying legal allegations were made years ago. Relegating Defendants' contribution claims against Plaintiffs to a second lawsuit would waste both the Court's and the parties' time and effort, and would present a danger of inconsistent results. Judicial efficiency is best served by incorporating Defendants' counterclaims into the present action.

III. CONCLUSION

The factors set forth above strongly favor allowing assertion of the CERCLA and associated Oklahoma law counterclaims, and the Cargill Defendants are aware of no factors that militate against such amendments. The Cargill Defendants submit that the phrase "when justice so requires" plainly encompasses a situation like this, where a party seeks to convert affirmative defenses to counterclaims based solely on preexisting allegations and theories in the case so as to comport with new Supreme Court precedent. The Cargill Defendants therefore urge the Court to grant their motion and give them leave to amend their respective Answers by asserting the attached proposed counterclaims against Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 10TH day of January, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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